IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.168 OF 2003

Yogesh Mehta ... Petitioner

v/s

V.M. Sawlani and anr. ... Respondents

WITH

ARBITRATION PETITION NO.169 OF 2003

Yogesh Mehta ... Petitioner

v/s

R.V. Rachwani and anr. ... Respondents

WITH

ARBITRATION PETITION NO.170 OF 2003

Yogesh Mehta ... Petitioner

v/s

S.R. Rachwani and anr. ... Respondents

Mr Rishabh Shah i/b Mr Ravi Goenka for Petitioner.

Mr Shailesh Shah with Mr P.N. Ganwani i/b Mr C.H. Pursnani for Respondent No.1.

CORAM : D.K.DESHMUKH J.

DATE : 6TH SEPTEMBER 2004

P.C. :-

1. By these three petitions, the identical awards made by the Arbitral Tribunal of the Bombay Stock Exchange dated 12th December 2002 directing the petitioner to pay the amounts of Rs.20,00,000/- and Rs.15,00,000/- with interest are challenged. Therefore, to decide these petitions, facts in arbitration petition No.168 of 2003 are taken into consideration. It appears that the case of the respondent No.1, who was applicant before the Arbitral Tribunal was that the petitioner had sold 2,00,000 shares of M/s Manoj Housing Finance Ltd. at Rs.10/- each aggregating to Rs.20,00,000/-. According to the respondent No.1, the petitioner had also issued contract notes evidencing the transaction. According to the respondent No.1, though the transaction being dated 20th May 1996 and the payment was to be made on 10th June 1996, it was not made. The demand notice

was issued, there was no reply to the demand notice. Therefore, the reference was filed. Three references were filed. It appears that all the three references were dismissed by the Arbitral Tribunal by award dated 19th July 1999. Against that, arbitration petition No.463 of 1999 was filed in this Court which was decided by this Court by order dated 5th November 2001. This Court st aside the award made by the learned Arbitrators. It appears that a fresh reference was made on 27th March 2002 and on that reference, the present award has been made.

2. It appears from the written statement filed by the petitioner that the case of the petitioner is that though he admitted that he had issued the contract notes on the basis of which the arbitration reference was made, the contract notes do not disclose the real nature of transaction between the parties. According to the petitioner, the real nature of transaction between the parties was that these shares were given to him by third party collateral security and at no point of time, he purchased the shares from the respondent No.1. In support of his case that the contract notes do not disclose the real nature of transaction between the parties, the petitioner relies on the fact that on the record of Stock Exchange on the relevant date, there is

no transaction carried out by the petitioner of these shares. Certain other defences were also raised by the petitioner including that as the transaction is not on the Bombay Stock Exchange, the Arbitral Tribunal does not have jurisdiction. The Arbitral Tribunal, however, rejected the defences raised by the petitioner and made the award in favour of the respondent No.1. At the outset, an objection was raised to the maintainability of the petition. The objection is that against the award which is impugned in this petition, the bye-laws of the Stock Exchange provide appeal to the Appellate Tribunal and without filing that appeal, this petition filed under section 34 of the Arbitration and Conciliation Act 1996 is not maintainable. In my opinion, the objection has no substance. Perusal of section 34 shows that an application can be filed against the arbitral award under section 34. The term 'Arbitral Award' is defined by section 2-C. Perusal of section 31 shows as to what is the form and content of an arbitral award. If one considers the provisions of section 31 of the said Act, it is clear that the award which is impugned in the petition, answers to the description of the term 'Arbitral Award' in the Act. In any case, it is nobody's case before me that the award which is impugned in the petition does not answer the term 'Arbitral Award'. I also find that this point has

also been decided by the learned Single Judge of this in the case of Abhijeet Saraswat v/s Nalamaty Doraiah and anr., reported in 2004(2) Mh.L.J. 145.

3. Now so far as the merits of the controversy are concerned, the Arbitrators rejected the defences put up by the petitioner, apparently for two reasons - (1) that the petitioner did not examine Gupta and Ramaswamy who, according to the petitioner, were the persons who delivered these shares to him as script and (2) the petitioner also did not examine himself as a witness. The observations of the Arbitrators are to be found in paragraph 6 which read as under :-

> " There is not even a particle of evidence to prove this fact. Gupta is not examined. Ramaswamy is not examined, nor is any other person examined as a witness to prove this fact. Not even the Respondent himself entered the witness box to state on oath that any such threat was given to him as stated above. He has merely filed one affidavit. it has no value as the version therein is untested by cross-examination. It appears from the papers filed that the Respondent did not even file a written statement before the Arbitrators in

the earlier references. If the version of the Respondent were true, he would have rushed to raise a contention in this respect. It appears that for the first time he stated about it in the arbitration petition in the High Court. In the absence of any evidence there is no hesitation in rejecting this contention as false."

. One more reason given by the Arbitral Tribunal is that the petitioner raised this question for the first time in the earlier arbitration petition filed in the High Court by the respondent No.1 and it did not appear before the Arbitrators in the first round.

4. It is pertinent to note that the petitioner was accepting that the contract notes on the basis of which reference was made were issued by him, but they do not depict real nature of transaction between the parties and in support of that, he was relying on certain circumstances. He has filed affidavit in support of the same. Though the respondent No.1 filed an affidavit disputing what the petitioner has stated in his affidavit, the respondent No.1 did not apply to the Arbitral Tribunal for permission to cross-examine the petitioner. The petitioner could not himself have

volunteered to be examined by the respondent No.1. In the absence of request being made by the respondent No.1 and that request being granted by the Arbitral Tribunal, in my opinion, therefore, the approach of the Arbitral Tribunal of rejecting the affidavit filed by the petitioner because he has not been cross-examined is basically wrong. In fact, in the absence of application for cross-examination of the petitioner, on behalf of the respondent No.1, the version stated in the affidavit could have been accepted by the Arbitral Tribunal. Had such an application been made by the respondent No.1, it was at that time for the petitioner to consider whether he wants to examine other persons as witnesss by filing their affidavit. it is further pertinent to note here that the petitioner was relying on the circumstance that this transaction is not shown on the record of the Stock Exchange to support his case that the contract notes do not disclose the real nature of transaction, but that aspect of the matter is brushed aside by the Arbitral Tribunal by holding that having issued the contract notes, the petitioner cannot now say that the transaction is not shown on the record of the Stock Exchange. In my opinion, therefore, the approach of the Arbitral Tribunal is basically erroneous in this regard also. That the transaction is not shown on the record of the Stock Exchange would be a circumstance in support

of the cased of the petitioner that he had issued the contract notes for some reason other than the transaction itself. Taking overall view of the matter therefore, in my opinion, the approach of the Arbitral Tribunal is basically wrong, the Arbitral Tribunal has rejected the affidavit filed by the petitioner on totally wrong considerations. In my opinion, the awards have violated the principles of natural justice. In this view of the matter therefore, in my opinion, the awards are liable to be set aside. In the result therefore, petitions succeed and are allowed, the awards impugned in the petitions are set aside.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary as true copy.

. Certified copy expedited.